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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1025

STATE OF MONTANA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Statement of Case.

This is an action at law brought by the United States, respondent herein, in the District Court of the United States for the District of Montana, against the State of Montana, appellant herein, and various individual property

owners for the purpose of condemning certain described parcels of land in Beaverhead County, Montana, for the purposes, as alleged in the complaint, of (a) prevention of soil erosion, (b) sanctuary for the propogation of migratory water-fowl by providing nesting, resting and feeding grounds in effectuation of the treaty between the United States and Great Britain, August 16, 1916 (36 Stat. 1702), (c) refuge for other forms of wild life common to this area, and (d) relief of unemployment by the construction of improvements and development work necessary for the use of the land in the manner described in said complaint (R. 4, 5).

The plaintiff below based its authority to bring the action upon the following:

1. Title II, National Industrial Recovery Act (48 Stat. 200) as extended by the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (R. 4, 8, 9).
2. Act of August 1, 1888 (25 Stat. 357) (R. 9).

Insofar as the State of Montana, defendant below, is concerned, part of the land sought to be condemned as property of the State comprised land embraced within Sections 16 and 36 in certain townships R. 10, 11) which were grants made the State under its Enabling Act of February 12, 1889 (25 Stat. 676) (R. 29, 30).

The complaint alleged, insofar as material here, that money had been appropriated to pay for said lands and was available when needed; that the property had not theretofore been appropriated to any public use; that the use to which the lands are to be applied is a use authorized by law; and that the taking is necessary to such use (R. 17). These allegations, with exception that the lands had not been appropriated for a public use, were by answer denied (R. 26).

By separate defense in its Answer, the State alleged its sovereignty, and upon information and belief alleged that the sole purpose for which the lands sought to be condemned was to provide a reservation or sanctuary for migratory birds to be used solely for the propogation and protection of such migratory birds as provided by Act of Congress, February 18, 1929 (45 Stat. 1222), as amended by Act of Congress, June 15, 1935 (49 Stat. 381) known as the Migratory Bird Conservation Act; that under Section 7 of said Act, title to such land could not be taken without the consent of the State (R. 27), and that the State had not consented thereto (R. 28); that plaintiff seeks by said action to acquire the lands by and through the Administrator of the Resettlement Administration for the purpose of delivering title thereto and the possession thereof to the Secretary of Agriculture or the Bureau of Biological Survey, for and on behalf of the United States, in order that said lands may be used solely as a sanctuary for migratory birds, and that such acquisition is unauthorized and contrary to the laws and policy of the United States (R. 29). The Answer further alleged that the lands were highly productive meadow, grazing and agriculture lands and have been used as such for many years; that the lands are low lying pasture lands capable of producing hay in satisfactory paying quantity and grazing livestock; that they are not sub-marginal of a class or character intended by any Act of Congress or of the President should be withdrawn from private or state ownership and acquired by the United States (R. 29).

The Answer further alleged that the lands in question were granted by the United States to the State of Montana under its Enabling Act, and accepted by the State with the provision that such lands should be disposed of by the State only at public sale after advertising; that by Secton

1 of Article XVII of the State Constitution, it was provided:

> "* * * nor shall any lands which the state holds by grant from the United States (in any case in wwhich the manner of disposal and minimum price are so prescribed) be disposed of, except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States."

That the United States or the State of Montana has not given consent to the disposal of said lands in any other manner (R. 30).

By Reply, plaintiff below denied, among other things, that the sole purpose of the acquisition of the lands was to provide a reservation or sanctuary for migratory birds to be used solely for the propagation and protection of such birds as provided by the Migratory Bird Conservation Act; that the consent of the State was necessary (R. 33); denies that the acquisition is for a sanctuary for migratory birds; that the United States is not vested with authority to acquire the lands for the purposes set forth in the complaint; alleges that the provisions of the Enabling Act, and amendatory act have no application to the United States and do not limit its right of eminent domain, but regulate transactions with reference to school lands between the State and private individuals (R. 34, 35).

A Declaration of Taking was filed (R. 35 to 50), Motion for Entry of Judgment was filed (R. 50), and thereafter the matter came on for hearing before the Court without a jury (R. 51). The State of Montana being the only defendant appearing, testimony was introduced (R. 52), at the conclusion of which the defendant moved to overrule the Motion of plaintiff for Entry of Judgment (R. 52), and is as follows:

> "Thereupon the defendant State of Montana moved the court to overrule the motion of the plaintiff herein

for the reason that the lands of the State of Montana sought to be condemned are not subject to condemnation or other disposal, except in accordance with the enabling Act and the Constitution of the State of Montana; second, that the State of Montana has not consented to the acquisition of any of the lands described in the said complaint, by the United States; third, that the land described in the complaint is not required for public use; that the plaintiff has not shown this court that the land described in the complaint is necessary for the use of the United States as is contemplated by either the statutes of the United States or the statutes of the State of Montana; that plaintiff's evidence does not entitle it to the relief sought or to enable this court to sustain plaintiff's motion herein; and that this court is without jurisdiction to grant the relief requested in said motion and complaint."

The matter was thereupon submitted to the Court, briefs were filed by both parties, and thereafter the Court made its order and decision (R. 53).

The order and decision of the trial Court, insofar as pertinent to the questions presented here, is as follows (R. 56):

"After mature consideration, I feel that on the present state of the record, but two of the contentions of the State of Montana can finally be disposed of. These contentions are:

"1. The lands of the State of Montana sought to be condemned are not subject to condemnation or disposal except in accordance with the Enabling Act and the Constitution of the State of Montana; and

"2. This Court is without jurisdiction to grant the relief requested in said motion and complaint (R. 48).

"In argument the State contends that this Court is without jurisdiction to grant the relief requested in said motion and complaint for the reason that the Supreme Court of the United States has exclusive

jurisdiction of this proceeding insofar as the State of Montana is concerned.

"I am of the opinion and hold that this contention is not well grounded.

"Act of August 1, 1888, C. 728, Sec. 1, 25 Stat. 357; Sec. 257, Title 40 U. S. C. A. U. S. *v.* California, 297, U. S. 175, 187-189;

U. S. *v.* 40 acres of land, District Court of the United States, District of Idaho, 24 Fed. Supp. 390.

"I am of the opinion and hold that the lands of the State of Montana sought to be condemned are not subject to condemnation or disposal except in accordance with the Enabling Act and the Constitution of the State of Montana.

"It was so held in the case of State ex rel. Galen *v.* District Court, et al., 42 Montana 105, 113-117, and the decision in that case is controlling here.

"Erie Railroad Company *v.* Tompkins, 304 U. S. 64; and Moody *v.* Toole County Irrigation District, decided by the Circuit Court of Appeals, Ninth Circuit, January 28, 1942; 125 F. (2) 498:

"It follows that the motion of the State of Montana should be and it is hereby granted."

Formal order dismissing the action as to the State of Montana and insofar as it relates to lands belonging to the State of Montana, was duly entered and filed (R. 53, 57).

Due Notice of Appeal was served and filed by plaintiff below, and thereafter and in due course Concise Statement of Points on which appellant intends to rely on appeal was served and filed, and is as follows:

"1. The trial court erred in dismissing this action as to the State of Montana and insofar as it relates to lands belonging to the State of Montana.

"2. The trial court erred in holding that the lands described in the complaint are not subject to condemnation or disposal except in accordance with the Enabling Act and the Constitution of the State of Montana.

"3. The trial court erred in granting the motion of the State of Montana to overrule the motion of the United States that the court enter an order adjudicating and determining that the lands described in plaintiff's complaint are required for the public use or uses therein alleged, and to enter a judgment on the declaration of taking filed by the plaintiff in this cause, letting plaintiff in possession of the lands and fixing the terms and conditions upon which plaintiff may enter into possession of the same.

"4. The trial court erred in holding that the case of State ex rel. Galen *v.* District Court, et al., 42 Mont. 105, 112 Pac. 706 (1910) is controlling of the issues in the instant case.

"5. The trial court erred in not entering judgment on the declaration of taking filed by the plaintiff in this cause, letting plaintiff in possession of the lands and fixing the terms and conditions upon which plaintiff may enter into possession of the same."

Defendant below in due course declined to offer any additional portions of the record on appeal (R. 67, 68), and thereafter Transcript of Record on Appeal was duly filed and served (R. 68, 69). Briefs were thereafter duly filed in the Circuit Court and the cause was argued and submitted (R. 75).

The main questions involved in the appellate court, and the contentions advanced by each party are set forth in the briefs filed in that court, but in the record appear in the Statement of Points relied on by the appellant below (R. 62), and the Motion of Defendant below to overrule the Motion of Plaintiff for Entry of Judgment (R. 52), and the same having hereinabove been set forth are for the sake of brevity hereby adopted and made a part of this petition.

Thereafter, and on March 6, 1943, the Circuit Court of Appeals rendered its opinion, and ordered the same, to-

gether with Decree to be filed (R. 75), and the same was filed in said Circuit Court on said date.

On the questions here presented and urged as error, the Circuit Court of Appeals held:

1. The decision of the Montana Supreme Court in the case of *State ex rel. Galen* v. *District Court,* 42 Mont. 105, 112 Pac. 706 (R. 77), is not binding on the Federal Court, for

(a) The decision is an interpretation of a federal statute (R. 79).

(b) The decision does not rule the case at bar because the state court did not decide that the enabling act prevented the United States from condemning school lands (R. 79).

2. Since the language of the Enabling Act does not clearly and specifically prohibit the United States from condemning the lands, the Court should not extend the prohibition to the United States. Citing, *United States* v. *Stevenson,* 215 U. S. 190, 197 (R. 79).

3. As thus construed, the statute is no obstacle to the instant proceedings. Citing, *United States* v. *2715.98 Acres of Land,* More or Less, 44 F. Supp. 683, 684, *U. S.* v. *Forty Acres,* More or Less, of Land, Etc., 24 F. Supp. 390, 391.

4. State ownership of lands does not prevent condemnation. Citing *Oklahoma* v. *Atkinson Co.* 313, U. S. 508, 534 (R. 79).

5. Since the complaint states the purposes of acquisition to be at least three, (a) prevention of soil erosion, (b) propogation and protection of migratory wild life, and (c) relief of unemployment, which reasons are repeated in the declaration of taking, the court cannot inquire into the intentions of the Administrator and find the purposes to be not three but one. Citing *City of Oakland* v. *United States,* 124 F. (2d) 959, 964 (R. 79, 80).

By its Decree the Circuit Court of Appeals reversed the Order of the District Court dismissing the action as against the State of Montana, and insofar as it relates to lands belonging to the State of Montana.

II.

Reasons Relied On for the Allowance of the Writ.

The decision of the Circuit Court of Appeals in holding that:

> (a) The United States under authority of Title II, Sections 202-203 of the National Industrial Recovery Act, (48 Stat. 200) (R. 3), as extended by the Emergency Relief Appropriation Act of 1935 (49 Stat. 115) (R. 4), and under the Act of August 1, 1888 (25 Stat. 357) (R. 9), may condemn state owned school lands granted the State of Montana under the Enabling Act, approved February 22, 1889 (25 Stat. 676) and particularly Section 11 of said Act as amended by Act of Congress approved May 7, 1932 (47 Stat. 150) and accepted by the State of Montana by Chapter 84, Laws of Montana, 1933, and contrary to Section 1 of Article XVII of the Constitution of the State of Montana.
>
> (b) The decision of the Supreme Court of the State of Montana in the case of *State ex rel. Galen* v. *District Court,* 42 Mont. 105, 112 Pac. 706, is not binding on the federal courts.

(1) involves important questions of federal law, which have not been, but should be, settled by this Court, in this, that therein are involved important questions affecting state rights, applicable to every land grant state in the Union, and the public interest will be promoted by a prompt settlement in this Court of the questions involved; (2) is in conflict with a decision of the highest Court of the State of Montana, to-wit, the Supreme Court.

Prayer for Writ.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 10210, United States of America, Appellant, *v.* State of Montana, et al., Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the decree herein of said Circuit Court be reversed by this Court, and for such further relief as may seem proper.

Dated May 7th, 1943.

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